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FILED
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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1953

No. 65

THE UNITED STATES,
Petitioner,

vs.

BINGHAMTON CONSTRUCTION CO. INC.

No. 78

BINGHAMTON CONSTRUCTION CO. INC.,
Petitioner,

vs.

THE UNITED STATES.

BRIEF OF THE BINGHAMTON CONSTRUCTION CO. INC.

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THE UNITED STATES.

BRIEF OF THE BINGHAMTON CONSTRUCTION CO. INC.

A. As Petitioner—In Support of the Issues Sought to Be Reviewed In Proceeding No. 78.

I.

The minimum wage schedule of the subject contract was void ab initio, because of respondent's failure to comply with the provisions of the "Davis-Bacon Act" and the "Labor Department's Regulation 503", for the predetermination of prevailing wage rates.

In substantiation of said charge, the attention of the Court is respectfully called to the following uncontroverted facts,—

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1. No preliminary Field Investigation and Report of the wage rates prevailing in the Contract area, was made by a duly appointed and qualified referee, as directed by *Regulation 503, Sections 4 and 5 (a)*. Instead, the Wage Schedule incorporated in the subject Contract was predicated upon an alleged field investigation by the *Contracting Officer* (Testimony, pgs 700-708), who admittedly had no authority to perform said duty (Testimony, pg 708) with which the Secretary of Labor is specifically charged by the *Davis-Bacon Act*, and who very certainly was not one of those designated by *Regulation 503, Section 5(a)* as qualified to engage in the predetermination of prevailing wage rates.

2. In addition to the technical objection that he was not qualified to act,—the Contracting Officer's report of his investigation (Deft's Exhibit 1, enclosure 5) clearly shows that he made no attempt to conduct his investigation in the manner and with the thoroughness directed by *Regulation 503*, and more particularly, that he neglected to hold the Public Hearing directed by *Sections 11 to 19* inclusive of said Regulation.

3. Moreover, even the inadequate evidence of prevailing wage rates incorporated in the Contracting Officer's said report, became suspect when, upon the trial of this action, James F. Doughty, Business Representative of both the *Carpenters Union, Local 532 of Elmira* (Testimony, pg 425) and of the *Elmira Building and Construction Trades Council* (Testimony, pg 402) when said field investigation was allegedly made,—and also Henry W. Streeter, a prominent Elmira contractor, by affidavits (attached to Pltf's Exhibit 11) and by their sworn testimony, *categorically denied* that they had either held the conferences, or expressed the opinions re prevailing wage rates, that were reported by the Contracting Officer

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(Testimony, Doughty, pgs 437-438 and 443; Streeter, pgs 563-564).

4. The Secretary of Labor acknowledged the inadequacy and illegality of said Wage Determination of January 31, 1941, incorporated in Petitioner's Contract when, on March 4, 1941, on issuing a new wage determination for the Contract area (Pltf's Exhibit 27) she stated in the second paragraph thereof, that her action was taken because the prevailing wage rates for the Elmira area "have not been determined recently *under the Act*" (emphasis added).

II.

Having ruled that the wage rate of 50¢ per hour for common labor shown by the erroneous Contract Wage Schedule, was a misrepresentation for which Petitioner could recover damages,—the Court below erred in awarding less than one half of the damages caused by said misrepresentation.

The Court below awarded Petitioner the difference between the erroneous rate of 50¢ per hour for Common Labor set forth in the Contract Wage Schedule, and the rate of 55¢ per hour found to be prevailing by the Wage Determination of March 4, 1941 (R. 68), upon the premise that on March 29, 1941, when the Contracting Officer advertised for bids on the subject Contract, he knew or should have known, of the Wage Determination of March 4th, and his failure to correct the Contract Wage Schedule to conform to same, constituted a misrepresentation of the true facts (R. 68).

The Court also found, that on and after April 1, 1941, the prevailing wage rate for Common Labor advanced

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to 62.5¢ per hour, and that Petitioner was obliged to pay said increased rate when it started to perform the Contract on June 3, 1941 (R. 44, Finding 11).

However, despite said finding, the Court refused to award Petitioner the additional damages caused by said rate increase from 55¢ per hour to 62.5¢ per hour, stating as its reason for said refusal that,——

> "* * * it is impossible to determine whether the District Engineer knew or should have known of its existence (i.e., the increase in rate to 62.5¢) at the time he awarded this contract to plaintiff." (R. 68)

We respectfully submit that the following facts disclose the Court's error in so ruling,——

1. Since,—as the Court ruled,—the District Engineer was chargeable with knowledge of the Wage Determination of March 4, 1941, fixing the Common Labor rate at 55¢ per hour, *he was also chargeable with the knowledge* that in said Wage Determination the Secretary of Labor specifically ruled that,——

> "*These rates are to be considered prevailing for ninety days from the date of this decision* (March 4, 1941), unless the decision is changed *prior* to the expiration of that period for contracts unawarded at that time." (Pltf's Exhibit 27) (emphasis added)

Said maximum period of ninety (90) days expired on *June 2, 1941,* and therefore, when Petitioner was awarded the Contract *on May 14, 1941* (R. 42, Finding 2) by the District Engineer—*subject to the approval of his superiors*—the District Engineer knew, or should have known, that *71 days* of said 90-day period had already

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expired, and that it would take the remaining 19 days to have the proposed award of the Contract to Petitioner duly ratified.

Therefore, on June 3, 1941, when the Contract became binding upon the parties, through the endorsement thereof by the Division Engineer (R. 8 & R. 42, Finding 2) the Contracting Officer knew, or should have known, that *the Secretary of Labor's latest Wage Determination for the Contract Area, had lapsed the previous day.*

Certainly at that time—if not earlier—a due compliance with the letter and intent of the *Davis-Bacon Act,* required that the Contracting Officer apply to the Secretary of Labor for a new wage determination. Had he done so, the Labor Department's resulting investigation would have disclosed the 62.5¢ hourly rate prevailing for Common Labor and Petitioner's loss and resulting claim for damages need never have occurred.

We respectfully submit that the violation of the statute disclosed by the foregoing undisputed facts, should alone be sufficient to justify Petitioner's claim.

2. That the Contracting Officer had personal knowledge,—long before April 1, 1941,—of the Common Labor wage rate increase to 62.5¢ per hour that occurred on that date, is disclosed by the following evidence,——

a. The Contracting Officer's signed Report to the Labor Department, of wage rates prevailing in the Contract area (Deft's Exhibit 1, enclosure 5), *dated January 10, 1941,* contains the following statement,——

> "* * *. The union states it is contemplating a new rate of $0.625 per hr. to be effective April 1, 1941. * * *"

b. Also, Petitioner's witness, James F. Doughty, who in 1940 and 1941, was Business Representative of the

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Elmira Building and Construction Trades Council, testified that on or about November 15, 1940, the Laborers' Local Union No. 1355 of Elmira, N. Y. advised the Contracting Officer by letter, that the wage rate for Common Labor would be increased to 62.5¢ per hour, effective April 1, 1941 (Testimony, pgs 428-429 and 431).

III.

In denying Petitioner's claim to an unpaid balance of $13,904.21 for Sheeting and Shoring installed under Contract Item No. 7 for the protection of six specific structures adjacent to the contract—the Court below erred in the following respects.

1. The Contract provides that the Sheeting and Shoring installed for the protection of said six (6) adjacent structures was to be measured *by the square foot of protected area* (R. 48, Finding 18) and Petitioner was to be paid the unit price of 65¢ for each square foot of area so protected (R. 48, Finding 19).

The parties were in agreement as to the locations where Sheeting and Shoring was installed for the protection of said structures—but differed greatly as to the size of the respective areas protected by said installations (R. 49, Finding 23, 1st par; also Defts. Exhibit 22, subd. B).

Petitioner has at all times freely disclosed the dimensions of length and width used by it in computing the protected areas—aggregating 24,805 square feet—claimed by it with respect to each adjacent structure (R. 50).

The Contracting Officer, however, while willing to disclose the number of square feet of protected area allowed by him for each of the six adjacent structures,—

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and together totaling 3,413.9 square feet (R. 49, Finding 23, 1st par.; also Defts. Exhibit 22, subd. B)—has consistently failed and refused to reveal the actual dimensions of length and width used by him in computing said payment quantities, despite Petitioner's repeated demands for said information, both prior to and at the hearings before the Commissioner.

Petitioner respectfully contends, that where a contractor's compensation is determined by applying the unit prices bid to the quantities of work performed, there is an implied duty on the part of the Contracting Officer to fully disclose the dimensions, field measurements, mathematical computations and methods used by him in computing the quantities allowed to the contractor—and more particularly so if there be any dispute as to the quantity so allowed.

That in the instant case, the Contracting Officer's refusal to reveal said dimensions and computations, constitutes a breach of the contract on the part of the Respondent Government, and such a failure on Respondent's part to justify the allowances made Petitioner, that the Court below was in error in sustaining his wholly inadequate allowance to Petitioner for Sheeting and Shoring installed for the protection of adjacent structures.

2. *The Court below approved the Contracting Officer's use of a formula for measurement of the area protected by Sheeting and Shoring installed to safeguard said adjacent structures, that denied Petitioner any compensation for the major and most costly part of the sheeting and shoring so installed.*

The trench excavated along the north bank of the Chemung River for the footings and foundation of the Flood Control Wall called for by the Contract, extended along—and very close to—the southerly, or river side, of

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each of said structures, and was carried to a depth of from 3 to 5 feet *below the bottom elevations of the foundation walls or footings of each of said structures.*

As Petitioner's trench excavation neared, reached and passed said *bottom elevations* of the abutting structures, it became necessary to substitute for the earth removed, a *Sheeting* of wood planks, placed against the face of the cut nearest to the structure, and held in place by *braces or shores,* of sufficient size and strength to give the *lateral support* necessary to hold immovable, the earth underlying and bearing the weight of each said structure.

Unquestionably, the Contract provisions for measuring and paying for the materials supplied for and the labor performed in placing said Sheeting and Shoring,—to wit, *by computing the square footage of the area protected by same, and paying the unit price of 65¢ per square foot,*—must be deemed ambiguous because of Respondent's failure to include in the Contract, a definition of "protected area".

In allowing to Petitioner for the areas protected, as to all six (6) abutting structures, an aggregate of only 3,413.9 square feet, the Contracting Officer,—while refusing to reveal the dimensions of length and heighth used in computing said aggregate area,—asserted that he had arrived at same——

> "• • • by using the length of the area actually sheeted and (had multiplied same by) the difference in elevation between the top of the sheeting and the *bottom elevation of the adjacent structures.*" (R. 69, see quotation at foot of page) (emphasis added)

However, said *method of measurement* is manifestly in error, since *it excludes all of the Sheeting and Shoring*

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installed in that portion of the trench extending from 3 to 5 feet below the bottom elevations of the abutting structures—and which portion supplied the greater part of the required *lateral support* and was the most costly to install.

We therefore respectfully submit, that in approving the Contracting Officer's said method of computing "protected area" and in rejecting Petitioner's interpretation of same, the Court below is in error,—and has wholly disregarded the rule expounded by this Honorable Court in *The United States* v. *Otis,* 120 U. S. 115; 30 Law Ed. 609, that——

> "• • • doubtful expressed in a contract should be construed strongly against the party who prepared the paper."

IV.

In refusing to award Petitioner the $6,070.19 of additional cost caused by the change in specifications for finishing concrete surfaces,—ordered in October of 1941, for use on concrete to be erected in 1942—the Court of Claims erred in the following respects:

1. The Court below presumably overlooked Article 3 of the subject Contract,—prepared on U. S. Standard Form No. 23—Rev. (R. 5) that in its pertinent portions provides as follows,——

> "ARTICLE 3. *Changes.*—The contracting officer may at any time • • • make changes in the • • • specifications of this contract and within the general scope thereof. If such changes cause an increase • • • in the amount due under this contract, • • • an equitable adjustment shall be made • • • " (Pltf's Exhibit 1, Item 1, p. 3).

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Also, paragraph 1-19, on page 1-14 of the Contract Specifications, that in its pertinent portions provides as follows,——

> "1-19. *Minor Modifications.*—The right is reserved to make such minor changes in the execution of the work to be done under these specifications as, * * * may be necessary or expedient to *carry out the intent of the contract, provided that the unit cost to the contractor of doing the work shall not be increased thereby.* * * * " (Pltf's Exhibit 1, Item 1.) (Emphasis added.)

The new specifications issued by the Contracting Officer on October 29, 1941 (R. 26, Finding 37) entitled "Method of Treating New Concrete Work" (R. 56-58) materially changed the method of treatment of exposed concrete surfaces, from that called for by the original Specifications (R. 53-54, see subdiv. [d] of quoted pp. 7-05 of Specs.), and provided for the use of three (3) materials not required by said original Specifications.

With respect to the concrete walls erected and finished in 1942, to which said new specifications applied, the additional expense that Petitioner is justly entitled to recover is undisputed at $6,070.19 (R. 64-65, Finding 50), which for the 2,782 cubic yards of concrete placed in 1942, meant an increase in the unit cost to Petitioner of $2.18 per cubic yard.

We respectfully submit that under the provisions of Article 3 of the Contract, and paragraph 1-19 of the Specifications, Petitioner is entitled to recover said additional cost, and the Court below should not have rejected said claim.

2. The ruling of the Court below,—that said new finishing specifications were no more than the detailed instruc-

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tions that Petitioner should have anticipated receiving, to supplement the very general directions contained in the original Specifications (R. 72),—is not only unsupported by any evidence, but is flatly contradicted by the testimony given by the Contracting Officer, at the hearings before the Commissioner.

At the hearing of September 21, 1949, General James C. Marshall,—who in 1941 and 1942 was the District Engineer at Binghamton, New York, and Contracting Officer for this Contract,—when called to the witness stand on behalf of Respondent, testified to the adequacy of the original finishing specifications, as follows,——

Testimony page 692:

> "Q. 176 * * * Is it your belief * * * that those specifications (those in the contract) if followed carefully by the average able contractor, will result in a suitable operation? A. Yes, by the average, able, experienced, conscientious contractor, he would have had results that would have been satisfactory."

Furthermore, when counsel for Petitioner read *from the original Contract Specifications,* the instructions as to the steps to be taken in finishing concrete, the District Engineer testified that if said instructions were followed exactly and carefully, the results desired under the Contract would have been achieved (Tr. 662-663; 664-665, Q. 82; 689).

In fact, the general tenor of the Contracting Officer's testimony, and the statements contained in his letters to Petitioner,—of October 20, 1941, complaining of the surfaces of concrete erected in 1941 (R. 55, Finding 38), and of October 29, 1941, forwarding the new specifications, referred to therein as "corrective measures" (Pltf's Exhibit 1, Item 16; and R. 26, Finding 37),—clearly show

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that the new specifications were issued because of his dissatisfaction with the appearance of the surfaces of the concrete erected in 1941 and his determination that the concrete to be erected in 1942 would have a more pleasing appearance.

We respectfully submit that while it might be argued that there was some justification for his issuance of the new specifications labelled "Method of Treating Existing Work" (R. 56), on the claim that the unsatisfactory appearance of the concrete already erected, was the fault of Petitioner,—there could be no justification for the issuance in 1941, of new specifications for finishing concrete not to be erected until 1942,—unless, of course, he was prepared to pay the extra expense involved.

Also, entries in the Contract "Log", or daily diary, kept by the Resident Engineer of the day-to-day happenings on the Contract (in evidence as Defendant's Exhibit 13A), disclose that on October 20-22, 1941, while carrying on concreting operations in accordance with the original Specifications, satisfactory surfaces were obtained on new concrete installed, through enrichment of the "design" or "mix" of the concrete, by increasing the cement content thereof from 5.5 sacks to 5.75 sacks per cubic yard, at an additional cost to the Government of only 15¢ per cubic yard of concrete placed.

The Contracting Officer, however, was unwilling to pay said increased cost, preferring to achieve the desired results by forcing Petitioner to follow the new specifications at an additional cost to Petitioner of $2.18 per cubic yard as aforesaid.

Finally, Petitioner's witnesses Charles H. Sells and William R. Brewster, licensed engineers, and the only disinterested expert witnesses called with respect to this issue, testified that said new specifications for treatment

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of concrete to be erected in 1942, should provide a surface finish not generally required for flood control walls; and that no contractor in bidding for the subject Contract, would have any reason to believe that he would be called upon to perform such work. Both witnesses testified that, in their opinion, the original Contract Specifications were both adequate in sufficient detail for the construction and finishing of the type of concrete wall called for by the subject Contract. (Testimony, Sells, pgs 1115-1116, Q. 75-77; Testimony, Brewster, pg 485, Q. 54, pg 546, Q. 202-203, pgs 466-488, Q. 47, pg 489, Q. 59, pg 491, Q. 63).

Said testimony was confirmed, when there was received in evidence,—as Defendant's Exhibit 18,—a printed pamphlet issued by the Portland Cement Association, wherein the Specifications set forth for the finishing of concrete surfaces of such ornamental structures as public buildings, etc., were found to conform to those that had been issued by the Contracting Officer on October 29, 1941 for finishing the surfaces of the Flood Wall sections to be erected in 1942.

In view of the foregoing facts disclosed by the record, we respectfully submit that the Court below was *not* justified in rejecting Petitioner's said claim,—and its action in so doing should be reviewed by this Honorable Court.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari, should be granted.

* * * * *

B. As Respondent—In Opposition to the Government's Contentions in Proceeding No. 65.

In bidding for the subject Contract, the Respondent did not regard the Minimum Wage Schedule incorporated

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therein, as a warranty that labor could be obtained at the rate specified.

However, Respondent did rely upon the truth of the statement contained in paragraph 1-31 of the Contract Specifications, that,——

> "The Secretary of Labor has determined the minimum wage rates applicable in the locality for the labor classifications anticipated to be used on the work."

Also, since said Specifications contained no information whatsoever, as to when said determination had been made, the Respondent believed—and had every right to believe—that said determination had been recently made, and when it submitted its bid on April 29, 1941, had no reason to suspect that the Wage Determination incorporated in the subject Contract, had been issued three months earlier.

While it is true,—and the Court has so found,—that Respondent made no independent investigation of prevailing wage rates, prior to bidding for the contract, Respondent's President testified before the Commissioner, that his omission of such an investigation, was due to his experience in bidding for numerous Federal contracts and his discovery that invariably the wage rates incorporated in said contracts were equal to and sometimes higher, but never lower, than those that actually prevailed in the contract areas (testimony, Davis, pgs 7-8, 20-21).

That as a result of said prior experience, it had been deemed unnecessary *to duplicate an investigation with which the Secretary of Labor was specifically charged by statute, and that the Contract positively represented had been made.*

It has repeatedly been held that a contractor was not to be deemed negligent in accepting as true, without in-

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dependent examination, the results incorporated in a contract, of an investigation made by the owner.

> *Hallerbach* v. *United States,* 233 U. S. 165, 172;
> *Christie* v. *United States,* 237 U. S. 234, 242;
> *United States* v. *Spearin,* 248 U. S. 132, 137;
> *United States* v. *Utah Stage Co.,* 199 U. S. 414, 424.

That the Government has generally recognized and acknowledged the existence of this principle, is evidenced by a fact of which this Honorable Court may take judicial notice, to wit,—that shortly following the letting of the subject Contract, the United States Government's Standard Form of Contract and Specifications, similar to that used for the subject Contract, was amended to include the following notice,——

> "The contractor will be expected to make his own investigations and determine for himself the wage rates which may prevail during the period of the contract. Wage rates which may be found to exceed the minimum herein set forth, will not be a basis for claim against the United States for added costs."

In bidding Respondent realized that in a Contract of 19 months duration, wages could not be expected to remain static, and in 1942 Respondent did, in fact, absorb without protest or claim against the Government, an increase of the wage rate for Common Labor, from 62½¢ to 75¢ per hour and an increase in the wage rate for Carpenters, from $1.125 to $1.25 per hour.

However, had the Minimum Wage Scale incorporated in Respondent's Contract, conformed to the wage scales that prevailed in April of 1941 when Respondent's Bid was prepared, Respondent would not have suffered the loss of $15,597.38 sought to be recovered on its wage claim.

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As hereinbefore shown under Point I of this Memorandum, in support of Respondent's concurrent Petition for Certiorari, the principal Contract misrepresentation justifying an award to Respondent was that the provisions of the *Davis-Bacon Act* had been complied with, in preparing the subject Contract for letting when, in fact, there had been so such compliance. As a result, the rates of wages specified with respect to Common Laborers and Carpenters, ***was not true on January 31, 1941,*** when the Wage Determination was issued by the Secretary of Labor.

Furthermore, and with respect to Petitioner's contention that the Wage Determination of March 4, 1941 should have had no bearing on the issues of this action, because same was issued for incorporation in another contract,—the attention of this Honorable Court is respectfully referred to the statement in said Wage Determination, that the rates incorporated therein were to be deemed prevailing in Elmira for a maximum period of ninety (90) days, unless changed prior to the expiration of said maximum period, for contracts still unawarded (Pltf's Exhibit 27).

It is respectfully submitted, that the Contracting Officer's failure to substantially comply with either the letter or the intent of the *Davis-Bacon Act,* in preparing and offering the subject Contract for bids, resulted in the award to Respondent of a Contract that, as to wage provisions, ***was void ab initio.*** That upon the trial of this action before the Commissioner, Respondent was entitled to remedy said deficiency by introducing the testimony and other evidence necessary to prove the wage rates that actually prevailed in Elmira, when the subject Contract was let.

Such evidence, having been introduced to the Record by the testimony of Respondent's witnesses, Doughty and Maywood, union representatives and Henry Streeter a contractor local to the Contract area, and said evidence being

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uncontradicted, Respondent became entitled to recover not only the amount awarded by the Court of Claims, but also, the balance of its said wage claim, with respect to which it has filed a concurrent Petition for Certiorari.

Conclusion.

For the reasons heretofore shown, Respondent respectfully submits that the Government's Petition to review the award to Respondent of $7,363.22, should be denied; and the concurrent Petition by Contractor for a Writ of Certiorari to review the decision of the Court of Claims denying the balance of the Contractor's claims against the Government, should be granted.

Respectfully submitted,

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Dated: September 14, 1953.

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